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No. 80-2173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN M. LIPMAN, President,
Licensed Beverage Wholesalers of Tennessee, Inc.,
Petitioner,

v.

WILLIAM M. LEECH, JR.,
Attorney General & Reporter,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT E. KENDRICK
Association Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2672

OF COUNSEL:
WILLIAM M. LEECH, JR.
ATTORNEY GENERAL
STATE OF TENNESSEE

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QUESTION PRESENTED

Whether Tennessee's Civil Investigative Demand Statutes that grant precomplaint investigatory authority to the State Attorney General to subpoena information relating to violations of state and/or federal laws and that require judicial approval to compel compliance therewith, violate the Equal Protection Clause and/or Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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WILLIAM M. LEECH, JR.,
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On Petition for a Writ of Certiorari to the
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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is reported at 612 S.W.2d 454 (1981) and reprinted in the Petitioner's Appendix at pp. 1a-15a. The opinion of the Court of Appeals of Tennessee and the final judgments and opinions issued by the Chancery Court of Davidson County reviewed by the Tennessee Supreme Court below are unreported. They are reprinted in the Petitioner's Appendix at pp. 16a-56a.

JURISDICTION

The opinion of the Supreme Court of Tennessee was rendered on February 2, 1981, and the judgment of that Court was

entered on the same date. Thereafter, Petitioner's petition for rehearing was denied on March 9, 1981. An application for extention of time to file this petition was filed on June 3, 1981 and granted by Justice Stewart by Order of that same date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). This Brief in Opposition is submitted within the time provided by Rule 24(1) of the 1970 Revised Rules of the Supreme Court.

STATUTE INVOLVED

The Civil Investigative Demand Statutes, Tenn. Code Ann. § 8-6-101 *et seq.* at issue are listed in the Petitioner's Appendix at pp. 14a-15a.

CONSTITUTIONAL PROVISIONS INVOLVED

The part of Section 1 of the Fourteenth Amendment to the Constitution of the United States at issue is:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 19, 1979, the Attorney General, by his Deputy, issued a Civil Investigative Demand to Norman M. Lipman (hereinafter called "Lipman"), President, Licensed Beverage Wholesalers of Tennessee, Inc. (hereinafter called "LBWT") (App. 69a). The Civil Investigative Demand (hereinafter cited as "CID") was issued pursuant to Tenn. Code Ann. § 8-6-402 and commanded Lipman to appear before the Attorney General's designated representative on March 20, 1979, at 10:00 a.m., and to bring with him certain documents and records of the LBWT

that were listed and demanded in the Attachment No. 2 to the Civil Investigative Demand (App. p. 81a-84a). By certified mail, Lipman received supplemental instructions on compliance with the Civil Investigate Demand from the Attorney General by his Deputy on May 2, 1979. The supplemental instructions were prompted by inquiries from persons upon whom CIDs had been served and were intended to alleviate "any undue burdens" for compliance with the CID (App. p. 85a-87a). At the request of LBWT, by its attorneys, the Attorney General by his Deputy, answered several questions relative to the CID that was served upon Lipman, but did not identify the parties to the investigation or comment upon the details of the investigation (R. 25-30). After several extentions of time for compliance, Lipman filed his action in the Chancery Court of Davidson County.

This civil action was instituted by Thomas A. Shriver, District Attorney General and Lipman, as a declaratory judgment and *quo warranto* action in the Chancery Court of Davidson County. Thomas A. Shriver has not joined in this petition. The complaint was a full scale attack on the constitutionality of the provisions of Tenn. Code Ann. § 8-6-401 *et seq.*, under which the Attorney General had issued the CID to Lipman. Lipman also alleged the Attorney General did not comply with the CID statutes. Upon Lipman's application for a temporary restraining order, the Attorney General & Reporter was restrained from issuing, executing and enforcing the Civil Investigate Demand Statutes.

The matter came before the Chancellor on June 1, 1979, upon the Attorney General's Motion to Dismiss, and twenty days later the Chancellor rendered a nineteen-page memorandum of law in which he dismissed the complaint.[1] Upon motions to

[1] Appendix pp. 42a-56a.

reconsider, the Chancellor rendered a second memorandum.[2] Final Judgment[3] was entered on July 25, 1979, from which the appeal to the Court of Appeals was lodged.

On appeal to the Tennessee Court of Appeals, Lipman raised constitutional and *quo warranto* issues as well as issues relative to the construction of the Civil Investigative Demand Statutes and the Attorney General's compliance therewith. The Attorney General & Reporter, under Rule 13(a) of the Rules of Appellate Procedure, also presented for review a statutory construction issue as to the Chancellor's holding that the Attorney General must establish administrative probable cause at any CID enforcement hearing.

On March 28, 1980, the Court of Appeals rendered its decision[4] and declared the Civil Investigative Demand Statutes, Tenn. Code Ann. § 8-6-401 *et seq.* unconstitutional, but affirmed the dismissal of the *quo warranto* claim against the Attorney General. In its reversal of the Judgment of the Chancellor, the Court of Appeals' decision apparently was founded on three legal theories. First, the Court suggested that the Civil Investigative Demand statutes are an excessive grant of power by the General Assembly to the Attorney General. Second, the Court found that the CID Statutes violated the Due Process Clause of the Fourteenth Amendment by the absence of reciprocal discovery; and the Equal Protection Clause and Article I, Section 17 of the Tennessee Constitution by its grant of a favored status for "pretrial discovery" by the State.

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[2] Appendix pp. 38a-41a.

[3] Appendix pp. 35a-37a.

[4] Appendix at 16a-34a.

Upon application of the Attorney General,[5] the Supreme Court accepted the Court of Appeals' decision for review. As will be discussed in more detail *infra*, the Supreme Court found that neither the Fourth Amendment nor the Equal Protection Clause to the United States Constitution nor the Due Process Clause of the Fourteenth Amendment was violated by the CID statutes because the applicable decisions of this Court and lower federal courts supported a finding of constitutionality.[6] Further, the Tennessee Supreme Court scrutinized the CID statutes and related court rules and found no fundamental unfairness in the CID process. The Court's opinion on the CID at issue states that the CID statutes had not been complied with because (1) the CID was not issued by the Attorney General himself; (2) the names of the parties to the expected litigation were not mentioned; and (3) the matter under investigation was not described with sufficient particularity.[7] It is noteworthy that the Attorney General submitted to each Court, since the initial decision of the Chancellor, that he would take no enforcement action as to the CID at issue in this case.[8]

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[5] *See* Rule 11(a) of the Tennessee Rules of Appellate Procedure.

[6] Appendix at 6a-11a.

[7] Appendix at 2a.

[8] Appendix A to this Brief in Opposition.

ARGUMENT

I. REASONS FOR DENYING THE WRIT

A. The Decision Below is Clearly Correct

1. The Tennessee Supreme Court Correctly Applied The Existing Federal Case Law That Rejects Petitioner's Constitutional Challenges

Petitioner's basic insistence in this petition is that so much of the decision of the Tennessee Supreme Court on certain constitutional issues raised by the attack on CID statutes is contrary to the decisions of this Honorable Court that interpret the requirements of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. Petition at pp. 15, 23. A review of the opinion of the Tennessee Supreme Court clearly shows that this Honorable Court's precedents were relied upon in resolving the Petitioner's claims under the Fourteenth Amendment. As to Petitioner's due process argument, the Tennessee Supreme Court recognized this Court's holding in *Wardius* v. *Oregon*, 412 U.S. 470 (1973), and considered its application to this CID statute. Upon such analysis, the Tennessee Supreme Court stated, for reasons that will be more fully discussed *infra*, that, "We are of the opinion the CID statutes comport with the fundamental fairness requirement voiced in *Wardius, supra*." App. at 7a. The Court also relied upon this Honorable Court's opinions that "... the CID is an investigatory proceeding, not an adjudicatory proceeding, as in *Wardius, supra*," App. at 7a.

The Tennessee Supreme Court also cited this Honorable Court's opinion in *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 108, 210 (1946), that, "The purpose of an investigatory proceeding 'is to discover and produce evidence, not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so." App. at 7a.

As to Petitioner's contention with regard to his and LBWT's alleged constitutional right to participate in a government enforcement proceeding, the Tennessee Supreme Court applied the principle of *Hannah* v. *Larche,* 363 U.S. 420 (1960), and quoted the principle of law expressed by the Court of Appeals for the Fifth Circuit in *Genuine Parts Company* v. *FTC,* 445 F.2d 1382, 1388 (5th Cir. 1971), that

> A party under investigation may not contest the discovery and production of evidence in the same manner he may contest the use of that evidence in an adjudication by proper objection, by the introduction of other evidence, and the other safeguards traditional to an adversary proceeding under our system. An investigation does not determine guilt or innocence; that is done at the adjudication, and thus it is there the whole plethora of due process rights designed to ensure the fairness of such a determination come to bear.

Accordingly, the Attorney General submits that there is no conflict between the Tennessee Supreme Court decision and the holding of this Honorable Court and the lower federal courts on the constitutional issues raised by this petition. As will be discussed in more detail *infra,* the Tennessee Supreme Court correctly decided the constitutional issues below and no state-federal conflict exists that warrants further review of the Tennessee Supreme Court's decision by this Honorable Court.

2. The Due Process Clause Of The Fourteenth Amendment Does Not Grant An Individual Or Company The Constitutional Right To Participate In A Governmental Investigative Proceeding

The Tennessee Supreme Court's holding on the due process issues raised below in clear accord with this Honorable Court's holding that the Due Process Clause does not create any individual or corporate rights to participate in administrative and

investigative procedures such as the CID statutory procedure in this case. In *Hannah* v. *Larche*, 363 U.S. 420 (1960), this Court rejected a strikingly similar Due Process argument that challenged the Civil Rights Commission's investigative procedures and held:

> The specific constitutional question, therefore, is whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identify of the complainants [footnote omitted] and to have the right to cross-examine these complainants and other witnesses. *Although these procedures are very desirable in some situations, for the reasons which we shall not indicate, we are of the opinion that they are not constitutionally required in the proceeding of this Commission.* Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures that have traditionally been associated with the judicial process. *On the other hand, when governmental action does not partake of an adjudication, as for example, when a general factfinding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Id.* at 441-42. (Emphasis added)

The Tennessee Supreme Court relied upon the Fifth Circuit Court of Appeals' holding on the precise argument made here at Petition, p. 20, that any attempt to graft "the principle of [*Escobedo* v. *Illinois*, 378 U.S. 478 (1964)] into the field of administrative law [was] without merit." *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1387 (5th Cir. 1971).

This judicial distinction, for constitutional purposes, between investigatory and adjudicatory proceedings was also stated by this Honorable Court in *In re Groban's Petition*, 352 U.S. 330,

(1957), where a state fire marshal pursuant to a statute, was conducting an investigation into the cause of a fire. The fire marshal subpoenaed several witnesses to testify, but the witnesses refused to testify unless their counsel were present. The fire marshal treated the refusals as contempt and the fire marshal himself committed the witnesses to the county jail until they decided to testify. On application for habeas corpus, the matter was litigated in the state courts and on appeal to the United States Supreme Court, the Court stated:

> We hold that appellants had no constitutional right to be assisted by counsel in giving testimony *at the investigatory proceeding* conducted by the fire marshal and that section 3737.13, insofar as it authorizes the exclusion of counsel while a witness testifies, is not repugnant to the Due Process Clause of the Fourteenth Amendment. *In re Groban's Petition,* at 335, 514. (Emphasis added).

The Court further stated:

> A witness before a Grand Jury cannot insist as a matter of constitutional right, on being represented by his counsel, (footnote omitted) nor can a witness before other investigative bodies (footnote omitted) there is no more reason to allow the presence of counsel before a fire marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay witnesses open to criminal charges. When such charges are made in a criminal proceeding, he *then* may demand the presence of his counsel for his defense. *In re Groban's Petition* at 333, 513.
>
> Section 3737.13, which has been in effect since 1909, (footnote omitted) represents a determination by the Ohio legislature that investigations conducted in private may be the most effective method of bringing to light facts concerning the origins of fires, and, in the long run, of reducing injuries and losses from fires caused by negligence or by

> design. We cannot say that this determination is unreasonable. The presence of advisor to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. *Id.* at 334.

This holding makes it clear that investigative proceedings are not subject to the full panoply of procedures applicable to criminal proceedings as suggested by Lipman. The Kansas Supreme Court has also dealt with similar claims in a civil investigative demand proceeding by the Kansas Attorney General. *State ex rel. Londerholm* v. *American Oil Co.*, 446 P.2d 754, 757 (Kan. S.Ct. 1968), the Court considered and rejected *inter alia* the contentions that a corporation was entitled to have its counsel present at an investigatory proceeding by the State Attorney General.

In sum, Lipman's argument that he, LBWT and their counsel have a constitutional right to participate in the State's civil investigation is without constitutional support and the Tennessee Supreme Court properly rejected it.

3. The Holding In *Wardius* v. *Oregon* Involved A Criminal Trial And Does Not Apply To A Civil Administrative Investigatory Proceeding That Requires Judicial Approval To Compel Compliance

The constitutional requirement of reciprocal discovery, cited by the Petitioner, is applicable only in the context of criminal proceedings with no discovery available to the criminal defendant. The Tennessee Supreme Court, in its opinion, declared *Wardius* v. *Oregon*, 412 U.S. 470, (1973), distinguishable from the instant case. App. at 7a. It is noteworthy that the Chancellor at the trial court imposed a restriction that oral testimony acquired by a CID could be used for such purposes as impeachment. App. at 5a. The Attorney General did not appeal that restriction. For these reasons more fully discussed below, the Attorney General submits Wardius is totally inapplicable to the CID statutory framework.

In *Wardius* the "fundamental unfairness" found by the Court as violative of the Due Process Clause and unconstitutional was that the criminal defendant was denied access to any evidence of the kind that he was required by Oregon law to divulge to the prosecution. The defendant in *Wardius* could not review the names of the State's alibi rebuttal witnesses and his alibi witness' testimony was stricken. 412 U.S. at 473. *Wardius* was decided in the context of pending criminal litigation and upon a finding that the state scheme resulted in a fundamental unfairness to the criminal defendants.

Wardius is therefore distinguishable for several reasons. First, the Tennessee CID proceeding at issue is *investigative* in nature, *not adjudicative.* Accordingly, the CID, as used in this case, would not be within the purview or spirit of *Wardius* that involved a trial. Second, the Attorney General has no criminal enforcement powers in this matter. Any proceeding brought by the Attorney General as the result of this CID would be civil. The civil rules of discovery would apply. Unlike this Oregon statute, the Tennessee Rules of Civil Procedure have virtually identially discovery provisions as in the Federal Rules of Civil Procedure. These discovery rules and the case law thereunder provide a suitable and appropriate device by which Lipman and/or LBWT may seek to obtain access to information acquired during a civil investigative demand proceeding in any subsequent civil proceeding. Lipman, if named as a party at any subsequent civil proceeding, will not be deprived of discovery of all evidence, as in *Wardius,* so as to deny him his constitutional right to a fair trial, particularly with the Chancellor's decision to limit the use of CID testimony for impeachment. The identity of persons who testified by CID and documents that are received by a CID could be subject to discovery requests under the civil rules of discovery in accordance with the case law and under judicial supervision.

In sum, no cognizable due process rights violations were alleged in the courts below. Lipman's assertions that under the

Due Process Clause of the Fourteenth Amendment he, LBWT and their counsel have some unspecified right to an opportunity to conduct discovery in an ongoing state investigation into law violations are clearly without merit.

4. The Tennessee Legislature Created A Permissible Legislative Scheme, Consistent With The Equal Protection Clause, To Investigate Violations Of Its Laws

In his petition, Lipman urges that the Tennessee CID statutes, Tenn. Code Ann. § 8-6-401 *et seq.* are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The essence of Lipman's claim is that the CID statutes unreasonably classified litigants to give the State a favored status. It is interesting to note that Lipman cited *no* case law in his brief in the trial court on this equal protection issue. Moreover, no citation to any law was made in his Court of Appeals brief that an equal protection issue. Under Rule 36 of the Tennessee Rules of Appellate Procedure, the Attorney General argued in the Tennessee Supreme Court that Lipman should not be heard not to complain on the equal protection issue. In any event, the Attorney General submits that the Tennessee Supreme Court and the Chancellor were correct in the analysis of the equal protection agrument.

Under federal case law on equal protection issues, it is also a rule of adjudication on the constitutionality of state legislation that the state legislature is presumed to have passed a constitutional state act. *Goldblatt* v. *Town of Hampstead, New York,* 369 U.S. 590, 596 (1962); *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Metropolitan Casualty Ins. Co. of New York* v. *Brownell,* 294 U.S. 580, 584 (1935); *Middleton* v. *Texas Power & Light Co.,* 249 U.S. 152, 157 (1919).

In *Middleton* v. *Texas Power and Light Co.,* 249 U.S. 152, 159 (1919), this Court observed:

> There is a strong presumption that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

Clearly, an Equal Protection Clause violation is only presented "by laws that are invidiously discriminatory - only by classifications that are wholly arbitrary and capricious." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 60 (1973). (Concurring Opinion of J. Stewart). Thus, the Attorney General submits that even with the alleged identifiable classes, such as described by Lipman, "[t]he Equal Protection does not mean that a state may not draw lines that treat one class of individuals or entities different from the others. The test is whether the difference in treatment is an *invidious discrimination*." (Emphasis added). *Lehnhausen* v. *Lake Shore Auto Parts*, 410 U.S. 356, 359 (1973).

In addition to the legal presumption accorded these statutes, the enactment of similar laws and the judicial confirmation of those statutes in the federal and state courts demonstrate the rational basis of this CID statute. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950) (Federal Trade Commission); *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 204-06 (1946) (Administrator of the Wage and Hour Division); *Material Handling Institute, Inc.* v. *McLaren*, 426 F.2d (3d Cir. 1970), *cert. denied*, 400 U.S. 826 (1970) (United States Attorney General); *Lightning Rod Manufacturers' Assn.* v. *Staal*, 339 F.2d 346 (7th Cir 1964); *Hyster Co.* v. *United States*, 338 F.2d 183 (9th Cir. 1964); *Gold Bond Stamp Co.* v. *United States*, 325 F.2d 1018 (8th Cir. 1974), *aff'g Petition for Gold Bond Stamp Co.*, 221 F.Supp. 391 (D.C. Minn. 1963); *In re Application of Hirschorn*, 402 N.Y.Supp.2d 520 (N.Y.S.Ct. 1978)(State Attorney General); *Lewandowski* v. *Danforth*, 547 S.W.2d 470 (Mo. S.Ct. 1977)(State Attorney General); *Commonwealth ex rel. Hancock* v. *Pineur*, 533 S.W.2d 527 (Ky. S.Ct. 1976)(State

Attorney General); *Steele* v. *State of Washington ex rel. Gorton, Attorney General,* 537 P.2d (Wash. S.Ct. 1975); *Mobil Oil Corp.* v. *Killian, Attorney General,* 301 A.2d 562 (Conn. Superior Ct. 1973); *People* v. *Crawford Distributing Co.,* 291 N.E.2d 648 (Ill. S.Ct. 1972). Other legal authorities have endorsed in relatively recent times the concept of a pre-complaint investigative proceeding. *See The Prettyman Report* (Procedures in Antitrust and Other Protracted Cases), 13 F.R.D. 62, 67 (1951); *Report of the Attorney General's National Commission to Study the Antitrust Laws,* 343-44 (1955). The Prettyman Report was prepared by a panel of federal judges who observed that:

> It is said that vague complaints in civil antitrust cases brought by the government are unavoidable because the inquisitorial power of the Department of Justice in civil matters is inadequate and the Department's only recourse is to file complaints containing indefinite allegations and thereafter to utilize the processes of the court to discover the facts. It may well be that the powers of investigation of the Department are not sufficient for these tasks and that Congress should be asked to remedy that deficiency, or that ample investigative powers of the Federal Trade Commission should be utilized. The Prettyman Report (Procedure in Antitrust and Other Protracted Cases) 13 F.R.D. 62, 67 (1951).

As this report also notes, absent a procedure such as the CID statutory scheme here, the courts become "an investigatory adjunct to the government" and that the government "cannot pretend to bring charges in order to discover whether actual charges should be brought." *Id.* at 67. It is in the public interest that before the State institutes litigation that the State attempt to assure itself that its suit has a valid basis before it imposes the burden of litigation upon persons, firms and the Courts.

These authorities illustrate that the passage of investigatory statutes has a rational basis. Thus, under the dcecisions of this Court, no equal protection violation is presented.

B. No Compelling Reasons Exist To Warrant Review By This Court

None of the Petitioner's arguments that the CID statutes are unfair or create an impermissible favored status for the State have merit. First, Petitioner argues the CID process is unfair because testimony may be taken by CID and "There is no opportunity to cross examine or make appropriate objection." The Chancellor held that CID testimony cannot be used as direct evidence, but may be used for limited purposes such as impeachment. Thus, if any litigation is brought the witness who has testified pursuant to a CID must be produced at the trial in order to present his testimony. Petitioner may have the opportunity to depose the witness. At such a trial or deposition there would be a meaningful "opportunity to cross examine or make appropriate objections" as to any of his testimony. The trial judge would rule on the admissibility of such evidence: such a scheme is not unfair.

Second, Petitioner claims that the CID process gives him or LBWT "no way of protecting trade secret information in the hands of the witness." As a factual matter, the record indicates that the State has evidenced a willingness to consider any protective measure that petitioner suggest with regard to any information that LBWT deems to be trade secret. *See* App. at 94a. As a general proposition, courts have found such a trade secret objection to be premature in a CID investigative proceeding. In *Lewandowski* v. *Danforth, Attorney General,* 547 S.W.2d 470 (Mo. S.Ct. 1977), the Missouri Supreme Court, in upholding the validity of a similar Missouri CID statute, observed on a similar trade secret argument that:

> Appellants finally assert that they should not be compelled to disclose certain information in response to the CID because such information constitutes trade secrets. The assertion is premature. And may be made at such time the Attorney General seeks to present such information before any court. *Id.* at 473.

In the federal system, courts have conditioned enforcement of administrative subpoenas on agency assurance of protective measures for trade secrets. *See FTC* v. *St. Regis Paper Co.*, 304 F.2d 731, 732, n. 1 (7th Cir. 1962). Lipman has not asserted any need for protection of any alleged trade secret information of LBWT and he can make no such claim on behalf of any company or person who is not associated with LBWT.

Lipman and LBWT also assert that the CID provides "no way of ... asserting any privilege with the witness may be unwilling or unable to interpose or of which the witness may be ignorant." Lipman has made no claim of any personal privilege. The complaint charges that the statute on its face violated the right against self-incrimination. Thus, it is not certain whether there is any factual basis for this contention in this case. To the extent that such a privilege issue would arise, the Tennessee Supreme Court pointed out:

> The privilege against self-incrimination necessarily limits statutory procedures, whether or not such limitation is included in the statute, and a judicial procedure under which the subpoena party can invoke the privilege is provided in the CID statutes. T.C.A. § 8-6-405. 612 S.W.2d at 459.

Tennessee statutory scheme clearly indicates that any issue of privilege should be determined by the Court. Of course, petitioner has asserted no privilege with regard to any of the information requested in the CID at issue in this case, and he, or course, cannot assert the privilege of others. To the extent that there may any problem with privilege, the real prejudice occurs at its introduction of such evidence at trial, which is a matter

that the court will decide. Prior to that time it is an area for discovery. The facts of this case, however, suggest that this petitioner has been fully advised as to any and all legal and constitutional privileges available to him.

It is further argued that in the CID proceeding there is no avenue to protect a witness from annoyance, embarrassment, oppression, undue burden or expense. The Attorney General submitted a construction of the CID statute in accord with the federal civil investigative demand that would require judicial intervention in the presentation of specific proof of abuse or harrassment. *See* Appendix B hereto. Federal courts have limited enforcement of administrative subpoena on grounds of undue burdensomeness. *S.E.C.* v. *Brigadon Scotch Dist. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert denied*, 415 U.S. 915 (1974).

Finally, it is suggested that the CID permits the State Attorney General "to engage in, compelled secret discovery in his preparation for trial." The Attorney General can only request information under the Tennessee CID statute. It is the state trial court alone, not the Attorney General, who can actually order or compel testimony or documents to be given pursuant to a civil investigative demand. Once litigation is commenced, it would also be for the court to determine whether any information acquired by CID falls within the scope of § 8-6-407 or §10-7-504(d) that accords confidential status for information in the Attorney General's office relating to pending or contemplated litigation. Moreover, the issuance of an administrative subpoena during pending litigation has not been found to be constitutionally impermissible. *See Atlantic Richfield Co.* v. *FTC*, 398 F.Supp. 1, 15 (S.D. Tex. 1975)("the FTC may conduct investigations simultaneously"). In any event, as the Tennessee Supreme Court states, the civil rules of discovery protect against unfairness and the "advantage, if any, conferred upon the State." App. at 7a.

In sum, the Petitioner's arguments are contrary to the case law, do not accurately describe the CID process, and lack compelling legal and factual support.

CONCLUSION

The Attorney General prays that the Petition for Writ of Certiorari to review the decision of the Tennessee Supreme Court be denied.

Respectfully submitted,

ROBERT E. KENDRICK
Associate Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2672

APPENDIX

APPENDIX A TO THE RESPONDENT'S BRIEF IN OPPOSITION

Norman Lipman v. *William M. Leech, Jr.*

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

State of Tennessee *ex rel.*,
Thomas H. Shriver,
and
Norman M. Lipman, President,
Wine & Spirits
Wholesalers of
Tenn., Inc.,
Appellees,

v.

William M. Leech, Jr.,
Attorney General &
Reporter,
Appellant.

[On Appeal From the Court of Appeals of Tennessee,
Middle Section at Nashville]

BRIEF FOR THE APPELLANT

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

OF COUNSEL:
WILLIAM M. LEECH, JR.
Attorney General

* * * * *

[40] ... result in substantial intrustions upon individual privacy. It is clearly understandable why the Courts held such matters to be personal to the Attorney General. *Coolidge* v. *New Hampshire,* 403 U.S. 450 (1971), and *Johnson* v. *United States,* 333 U.S. 10 (1948), are criminal cases. Here the proceeding is civil in nature and are not covert or surreptitous. The CID here is a written instrument that seeks corporate documents and permits the withholding of privileged documents. Moreover, here the CID remains subject to judicial review and no prejudice is suffered by appellees in this respect. The failure of the Attorney General personally to sign the CID does not render the CID constitutionally infirm.

As to the sufficiency of the description of the conduct under investigation, the Attorney General's non-enforcement representation on this and similar worded CIDs to the Court below and here should render this issue moot. In any event, appellee Lipman suffered no prejudice in that he could present this issue at the judicial enforcement hearing under Section 8-6-404. In those instances where state statutes have required that the Civil investigative Demand or subpoena to state the nature of the conduct involved, the courts consistently have recognized that any statement of the conduct must be general in nature. In *Petition of Gold Bond Stamp Co.,* 221 F.Supp. 191 (D. Minn. 1963), *aff'd,* 325 F.2d 1018 (8th Cir. 1964), the Court stated on the federal CID statute:

> To one acquainted with the nature of the trading stamp business, it may appear that the summarized statement as to the nature of the demand is too vague and too brief to be sufficiently informative of the scope and nature of the investigation. The task, however, must be whether the statement in the demand as to the nature of the conduct under investigation is sufficient to inform adequately the person being investigated and sufficient to determine the relevancy of the documents demanded for inspection. *Id.* at 397.

* * * * *

APPENDIX B TO THE RESPONDENT'S BRIEF IN OPPOSITION

NORMAN LIPMAN v. *WILLIAM M. LEECH, JR.*

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

State of Tennessee ex rel.,
Thomas H. Shriver,

and

Norman M. Lipman, President,
Wine & Spirits
Wholesalers of
Tenn., Inc.,
Appellees,

v.

William M. Leech, Jr.,
Attorney General &
Reporter,
Appellant.

[On Appeal From the Court of Appeals of Tennessee,
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BRIEF FOR THE APPELLANT

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

OF COUNSEL:
WILLIAM M. LEECH, JR.
Attorney General

* * * * *

[55] ... No allegations of abuse or harassment were alleged in the complaint and none of the exhibits thereto indicate any such activity. Absent clear and cogent proof of abusive action by the Attorney General to rebut this legal presumption, the CID should be enforced by the Courts.

The Attorney General submits that under the case law the following is the appropriate method of judicial review of Civil Investigative Demands issued pursuant to Tenn. Code Ann. § 8-6-401 *et seq.*, where there has been a failure of the witness to comply with a Civil Investigative Demand. First, as required by the statute, the Attorney General must certify to the Court that there has been a failure to comply. Under the legal presumption in Tennessee that a public official follows the law, the issuance of the CID itself would satisfy the legal requirement that the Attorney General has made the determination that "there is reasonable cause to indicate" that the State of Tennessee will be a party to litigation. This legal presumption, as expressed in the Tennessee cases and federal and state decisions cited, *supra,* would shift the burden of proof to the CID recipient to show why he failed to comply with the Civil Investigative Demand. As discussed, *supra,* in a civil contempt proceeding it is perfectly permissible to defend non-compliance upon the grounds that process was erroneously issued. Appellees could then present any specific evidence of abuse or harassment. If, upon conclusion of the defense, the Attorney General presented nothing to overcome any such proof, the Attorney General would run the risk of a court refusal to enforce a CID. See *Commonwealth of Kentucky ex rel. Hancock* v. *Pineur,* 533 S.W.2d 527, 530 (Ky. Sup.Ct. 1976). This procedure is in accord with the method of judicial review contemplated by the statute; would make the Civil Investigative Demand statutes meaningful and operative; and provide ample judicial protection against abuse. The Attorney General prays the Court to modify the Chancellor's judgment in this sole instance to the extent outlined herein.